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NO. 08 – 545

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BRYANT LAWSON, *ET AL.*,

Petitioners,

v.

BERETTA USA CORPORATION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONER

Rather than join the issues presented in the Petition, both the Respondents and the United States present a traditional Commerce Clause defense[1] of Congress's authority to enact economic legislation. Petitioners do not dispute that basic underlying authority. Moreover, there is no constitutional bar against Congress revising, limiting, or abrogating a cause of action it created. None of that, however, has any significance in this case, which challenges the constitutionality of the Protection of Lawful Commerce in Arms Act (PLCAA), Pub. L. No. 109-92, 119 Stat. 2096 (2005) (codified at 15 U.S.C. §§ 7901 to 7903).

Instead, the Petition is focused on a different and much narrower question: "whether Congress may use its Commerce Clause authority to regulate transactions that took place years before Congress acted," which actions were originally authorized under state law. Pet. 8. That question requires more justification than prospective economic legislation. Neither the Respondents nor the United States attempt to offer that necessary justification.

[1] U.S. CONST. ART. I § 8 provides Congress with authority to "regulate Commerce."

I. RETROACTIVE LEGISLATION REQUIRES GREATER JUSTIFICATIONS THAN ARE SUFFICIENT TO SUSTAIN PROSPECTIVE LEGISLATION

This Court has recognized that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). As a result, this Court has held that the "retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). *Usery* fully refutes Respondents' approach, which relies entirely on justifications that relate to the prospective application of the PLCAA.

Despite the deference generally accorded "legislation in the field of national economic policy," this Court still requires that "the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). *See also id.* at 733 ("retrospective civil legislation may offend due process if it is 'particularly "harsh and oppressive"' . . . that standard does not differ from the prohibition against arbitrary and irrational legislation.")

Petitioners' claim is that there is no "legitimate legislative purpose furthered by rational means" in economic legislation that regulates conduct that has already taken place. Instead, as

Usery makes plain, different and more compelling justifications must be offered than Respondents and the United States propound when they explain why the Commerce Clause authorizes Congress to enact commercial legislation as a general proposition.

Through the PLCAA, Congress sought to immunize Respondents from certain lawsuits challenging marketing and distribution practices of gun manufacturers and dealers that result in guns being used in criminal activity, unless authorized by a state legislature. It did not, however, stop there. It reached back in time to immunize past conduct that was already the subject of lawsuits that had not yet reached final disposition. It is undisputed that all of the acts and events that gave rise to Petitioners' claims took place more than nine years ago, when Petitioners filed this lawsuit. It is also undisputed that the lawsuit preceded the PLCAA by more than five years. Petitioners challenge whether the PLCAA's unique form of congressional time travel falls within its Commerce Power. At a minimum, it requires far more justification than a wave of a wand that denominates the PLCAA as economic legislation and thus within the Commerce Clause. *See* Brief in Opposition of Colt's Manufacturing Co. LLC, *et al.* 8-11 (hereinafter "Colt Br."). It is also no answer, as the United States argues, that the justification for retroactive application derives entirely from the clear expression of congressional intent to operate retrospectively. *See* Brief for Federal Respondent in Opposition 5 (hereinafter "U.S. Br.").

Petitioners contend that there is no necessary commercial nexus between events that have already taken place and any congressional attempt to regulate it today. *See United States v. Lopez,* 514

U.S. 549, 549 (1995) (holding that courts engage in a "case-by-case inquiry, that the [activity] in question has the requisite nexus with interstate commerce.").

Moreover, contrary to its characterization by Respondent, Petitioners do not rest their cause on a simplistic claim that they have a vested cause of action that may not be affected by legislation enacted prior to a final judgment.[2] Colt Br. 4-12. Instead, as the Petition makes plain, Petitioners assert that the PLCAA derives its authority solely from the power of Congress "to Regulate commerce . . . among the several States," even though a legislative body cannot "Regulate commerce" with respect to transactions that were completed before the legislation was enacted. Pet. 2. Its retroactive application thus lacks a legitimate legislative purpose furthered by rational means in cases like this one that have been pending based on transactions that took place long in the past.

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[2] It is unnecessary to get into a debate with both Respondents over the extent to which a cause of action is a vested property right for certain purposes. Whether or not it is does not control the question presented about the rationality of regulating commerce that took place in the past. Nonetheless, it is worthwhile pointing out that Respondents' claim that *Coombes v. Getz*, 285 U.S. 434 (1932) and *Ettor v. City of Tacoma*, 228 U.S. 148 (1913), have been "effectively overruled," Colt Br. 14 n.5, was denied by the case they cite for that proposition, *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n*, 110 F.3d 547 (8th Cir. 1997). In *Honeywell*, the Eighth Circuit acknowledged that neither *Coombes* nor *Ettor* have been overruled, 110 F.3d at 553, and the Eighth Circuit had no authority to overrule these decisions.

Ordering that a nine-year-old case pending in the courts for five years prior to enactment of the Act and raising liability tied to events that preceded the 2000 filing of that lawsuit be "immediately dismiss[ed]," *see* 15 U.S.C. § 7902(a), (b), does not "regulate Commerce." It is precisely that kind of attempt to reach back in time that caused James Madison to express the public's weariness with the "fluctuating policy" that arises from "sudden changes and legislative interferences, in cases affecting personal rights." THE FEDERALIST NO. 44, at 301 (J. Cooke ed. 1961). It has no place in our Commerce Clause jurisprudence.

Respondents ask this court to ignore its own precedents that hold legislation "unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and if the extent of that liability is substantially disproportionate to the parties' experience." Colt Br. 9-10 n.4, citing *Eastern Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998). To avoid that holding, Respondents reason that "nothing in that opinion . . . suggests the same rule would apply to retroactive *immunity* as opposed to *liability*." *Id.* (emphasis in original). Respondents take too narrow a view of *Apfel's* holding, one that logic does not support. At its core, *Apfel* stands for the proposition that it is fundamentally unfair to impose an unanticipated and retroactive financial burden on a party after the fact. In many instances, that financial burden will comprise a new liability, as it did in *Apfel*. In other instances, the financial burden will be on a plaintiff by granting a responsible party immunity, as PLCAA accomplishes. There is no analytical difference between a retrospective liability and a retrospective

immunity. They are opposite sides of the same coin and equally unconstitutional.

II. DUE PROCESS REQUIRES AN OFFSETTING BENEFIT

The United States contends that the PLCAA did not eviscerate all claims against gun manufacturers and distributers, U.S. Br. 7, which is true, but it did wipe out all of the claims these plaintiffs have without an offsetting benefit. The fact that other plaintiffs, past or future, may have some claims against these defendants does nothing to support the PLCAA's constitutionality. The United States further states that if the proposition requiring an offsetting benefit "was doubtful" in the challenge to the Price-Anderson Act, 42 U.S.C. 2210 (1976), "it is even more doubtful in this case," where the federal statute "preempt[s] state causes of action." U.S. Br. 7. The argument, however, is built on an unstable platform. This Court specifically left the question of whether a reasonable alternative remedy was necessary in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), because it determined the Price-Anderson Act did indeed "provide a reasonably just substitute." *Id.* at 88. Specifically, it found the statute's requirement that the nuclear industry waive all defenses, thus becoming subject to strict liability, and Congress's willingness to act as a guarantor against liability in excess of the $560 million ceiling provided a sufficient *quid pro quo*. *Id.* at 65, 66-67, 85-87.

It is also of no moment that Petitioners' claims are grounded in a statute rather than the common law, despite the United States' argument to the contrary. U.S. Br. 7. The District of Columbia

Assault Weapon manufacturing Strict Liability Act of 1990, D.C. Code §§ 7-2551.01 *et seq.*, which provides the basis for this action, has an equitable basis and is consistent with common-law tort principles concerning abnormally dangerous activities. *See* Restatement (2d) of Torts §§ 519, 520. Moreover, as the Court of Appeals recognized in this case, Petitioners' statutory claims constitute a substitution for their common-law negligence claims. Pet. App. 91-100a. Even if the foregoing was not a valid basis to invoke the offsetting benefit requirement when a statutory cause of action is eviscerated, this Court has repeatedly recognized that due process still applies. *See, e.g., Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985) (civil service retention rights); *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1 (1978) (utility services); *Goss v. Lopez,* 419 U.S. 565 (1975) (public education). The need for an adequate substitute remedy applies equally to Petitioners' claims as they would to common-law negligence.

Ultimately, Respondents concede that this Court has never answered the question directly. Colt Br. 12. The time has come for this Court to resolve this issue of great national importance.

III. THE LOWER COURTS NEED GUIDANCE ON THE LIMITS OF THE ADAGE THAT "LEGISLATIVE DETERMINATION PROVIDES ALL THE PROCESS THAT IS DUE"

As did the court below, Pet. App. 22a, the United States' opposition rests, in part, on the simple adage that the "legislative determination provides all the process that is due." U.S. Br. 8, citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982).

It makes no attempt to rebut or engage the conflict among the circuits and other holdings of this Court that deny such singular reliance. As the Petition detailed, this Court and others have recognized that at least a rational basis inquiry must be made, even to legislation labeled economic in nature when it operates retrospectively. *See* Pet. 21-23. *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 17. Such an inquiry necessarily embraces more than deference to the process of legislative determination.

Finally, the United States defends the PLCAA as another instance in which Congress merely attached "new legal consequences" to existing laws, such as requiring a jury trial or even adding actual damages in addition to loss of pay only. U.S. Br. 8. In such circumstances, however, Congress is amending one of its own laws. Here, Congress amended no existing federal law. *See* H.R. Rep. No. 109-124, at 41 (2005) (the PLCAA "makes no changes to preexisting law."). And, of course, Congress has no authority to amend state law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). It thus attached no legal consequences to an existing law. Moreover, the kind of changes in the law effectuated by the PLCAA, abrogation of a right of action granted under state law, amounts to a change of consequences of a different magnitude that cannot be so simply dismissed.

If the PLCAA is upheld, Congress will have the authority to wipe out any state cause of action retroactively against any defendant or set of defendants who can achieve sufficient political support, on the theory that eliminating potential past liability constitutes a proper regulation of interstate commerce. It is precisely that type of

possibility that Madison warned about in FEDERALIST NO. 44. The commerce power should not extend that far.

IV. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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